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In The
Supreme Court of the United States
October Term, 1984

KAROLE K. JENSEN, AS ADMINISTRATRIX OF THE ESTATES OF SYLVIA BROWN AND MICHAEL CLARK, DECEASED,

Petitioner,

v.

VIRGIL L. CONRAD, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF ALL RESPONDENTS

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QUESTIONS PRESENTED

I. IS THERE A FEDERAL CONSTITUTIONAL RIGHT TO BE PROTECTED BY THE STATE FROM HARM AT THE HANDS OF ONE'S PARENTS?

II. ARE THE DEFENDANTS ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE ALLEGED RIGHT, IF IT EXISTS, WAS NOT CLEARLY ESTABLISHED AT THE TIME OF THE DESCENDENTS' DEATHS?

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STATEMENT OF THE CASE

In reviewing the decisions of the district court in these consolidated appeals the United States Court of Appeals for the Fourth Circuit identified two issues for determination:

> The appellants' contentions, we believe, hinge on two "threshold" issues: whether the fourteenth amendment affords the appellants a right to affirmative protection by the state, and if such a right presently exists whether it was established clearly enough at the time the alleged deprivation occurred to avert the application of good faith immunity under *Harlow* [*v. Fitzgerald,* 457 U.S. 800 (1982)].

(A-22) In answering these questions the court traced the development of a constitutional right to affirmative protection by the state. The court examined cases in which courts had found the existence of a right to be protected by government from harm at another's hands. The "most relevant line of cases" found by the court were those cases, beginning with this Court's opinion in *Estelle v. Gamble,* 429 U. S. 97 (1976), that declare an affirmative obligation on the part of government to protect prisoners by providing for their medical care. Several decisions of the Fourth Circuit as late as 1980 expanded the eighth amendment protection found in *Estelle* to include an affirmative duty to protect inmates from harm at the hands of other inmates. The court pointed out, however, that in 1980 its decisions had limited the imposition of an affirmative duty of protection to prison settings involving eighth amendment concerns (A-28).

The court's evaluation of the development of the law led it to conclude that their decisions after 1980 arguably bridged the gap between eighth amendment protections and fourteenth amendment analysis. The court found that a right to affirmative protection and corollary governmental duty could arise under the fourteenth amendment in the presence of "special custodial or other relationships created or assumed by the state in respect of particular persons." The court made it clear, however, that an affirmative duty of protection under the fourteenth amendment outside of a prison setting was not established until after 1980.

Because no right of protection under the fourteenth amendment, was clearly established at the time of these children's deaths, the court held consistent with the reasoning outlined in *Harlow v. Fitzgerald,* 457 U.S. at 818, that the defendants are entitled to good faith immunity as a complete defense from Section 1983 liability. The court reasoned that the defendants could not fairly be required to anticipate the development of the "special relationship" right that resulted from the expansion of eighth amendment protections into fourteenth amendment analysis. Even assuming that the defendants could have anticipated these developments, the court also found that it is not clear that the defendants should have foreseen that a "special relationship" existed on the facts of this case.

> Given the absence of specific guidelines to determine precisely what constitutes a "special relationship" and the particular "close" nature of the factual case before us, we would be hardpressed to conclude that the law as it affected the defendants was "clearly established."

(A-45) The Fourth Circuit held that though the fourteenth amendment may afford the appellants a right of affirmative protection by the state, such a right was not established clearly enough at the time the alleged deprivation occurred to avert the application of good faith immunity under *Harlow*.

ARGUMENT

The Petitioner relies on two grounds in support of her Petition for Writ of Certiorari. She maintains that the writ should issue because (1) the problem of child abuse is of great importance to the public and (2) the Fourth Circuit's application of the good faith immunity defense would stagnate the development of civil rights law.

I. State Statutes Do Not Create Federal Rights.

While it is true that the problems of child abuse and neglect are serious and of great public concern, most of the issues that reach the court are of great public importance. This fact alone does not support the grant of a Writ of Certiorari. Petitioner argues, however, that because the petition raises the question of what constitutional duties are created by state child abuse prevention statutes, this Court's consideration of the issues presented are of particular national significance.

The question of whether state statutes may give rise to federally protected rights is squarely addressed in this Court's decision in *Egar v. City of Aurora*, 365 U.S. 514 (1961). The court in *Egar* clearly held that state statutes do not give rise to rights enforceable under Title 42 U.S.C.

Section 1983. The petitioner concedes as much in her petition at pages 36 and 37. There is, therefore, no reason for the Court to examine the effect of these statutes under Section 1983.

II. The Fourth Circuit Properly Applied the Defense of Qualified Immunity.

The second ground raised by the Petitioner, likewise, does not warrant granting a Writ of Certiorari in this case. The Fourth Circuit's application of the good faith immunity defense is in strict accordance with this Court's decisions in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). Petitioner, however, seriously oversimplified the questions before this Court where she states:

> If there is a right to life created by the constitution, which was clearly established at the time of the conduct in question, the test of *Harlow* has been met.

(Petition at 38.) As stated by the district court (Judge Clyde H. Hamilton) in the Sylvia Brown case:

> [A]n official's knowledge of a general constitutional provision, such as the Fourteenth Amendment, does not always tell him whether proposed action or inaction would violate that general constitutional provision. The defense of qualified immunity depends instead on an analysis of whether the courts have decided that a *particular right* is included within the general constitutional provision. (citations omitted) (emphasis in original).

(A-86-87)

The Fourth Circuit carefully examined the law as it existed at the time of these children's deaths to determine whether the courts had decided that the *particular right* to protection claimed by the petitioner was included

within the fourteenth amendments protection. This is the analysis required by *Harlow*.

In *Harlow* this Court established a standard of fairness by which official conduct is to be judged. The court concluded that it is not fair to require governmental officials to anticipate changes in the law or know that the law forbade conduct not previously identified as unlawful. Thus, the Court held that if the law at the time of alleged violation is not established with sufficient clarity to put a reasonable official on notice that his conduct is forbidden, immunity applies.

The Petitioner contends that the Fourth Circuit's analysis goes further and entitles governmental officials to good faith immunity in every case in which there is no prior court decision "directly on point" and allows officials to "hide behind the claim that the particular factual setting in question has never been addressed in a reported opinion." (A-34). This is clearly not the approach taken by the Fourth Circuit.

The court made it clear that its inquiry was not limited to search for a case directly on point. The court stated:

> Thus, our examination of case law must be aimed at determining the extent to which a clearly defined right had emerged from this shifting line of cases as of 1979.

In examining the scope of the fourteenth amendment protection the Fourth Circuit correctly looked to the only source available, the decisions of this Court and the United States Courts of Appeal. After careful examination of these cases the court found that the most relevant line of

cases existing in 1980 are those dealing with protection of prisoners in an eighth amendment context. Certainly it is not fair for these state officials to be charged with the foresight to view these cases as ultimately controlling their conduct in adopting and implementing programs for protection of abused and neglected children. No more relevant line of cases or legal analysis was found by the court and none has ever been suggested by the petitioner other than the bare assertion that the right to life is "clearly established" because it is in the fourteenth amendment.

III. Respondents Do Not Forfeit Their Qualified Immunity Because They Failed to Comply With Clear State Statutes.

The petitioner complains further that the court should have considered factors other than reported cases in determining that the law was clearly established. Specifically, she claims that the "better view" is that taken by the district court (Judge William W. Wilkins) in the Michael Clark case, where the court held that when a governmental official acts in violation of a specific state statute he may not claim *Harlow* immunity. This approach was expressly rejected by this Court last term in *Davis v. Scherer,* 52 U.S.L.W. 4956 (1984). In *Davis v. Scherer,* this Court held that state officials do not forfeit their qualified immunity by failing to comply with clear state statutes or regulations. This court, therefore, has authoritatively decided this issue.

———o———

CONCLUSION

Because the petition presents issues that have already been decided by this Court; and because the Fourth Circuit's application of this Court's decision of *Harlow v. Fitzgerald* is correct, this Court should deny the Petition for Writ of Certiorari.

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